WINONA OIL CO. ET AL.

IBLA 96-319 Decided September 25, 1998

Appeal from a decision of the Utah State Office, Bureau of Land Management, affirming a denial of a request for suspension of eight Federal leases until a contract could be negotiated for extraction of helium from the Woodside Dome. SDR UT-96-2.

Affirmed.

1. Oil and Gas Leases: Suspension of Operations and Production--Mineral Leasing Act: Generally

Section 39 of the Mineral Leasing Act, as amended, provides for suspension of a Federal oil and gas lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee timely access to the property , or (2) as a matter of discretion, in the interest of conservation. Where there is no persuasive evidence of undue delay imposed by administrative actions or denial of the benefits of an oil and gas lease, an application for suspension under section 39 is properly denied.

APPEARANCES: Peter J. Wall, Esq., and Donald D. Farlow, Esq., Burns, Wall, Smith, and Mueller, P.C., Denver, Colorado, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Winona Oil Company, Freeman Investments, and John A. Worden (Appellants), have appealed a March 5, 1996, Decision of the Deputy State Director, Utah State Office, Bureau of Land Management (BLM), affirming a ruling of the Associate District Manager, Moab District, BLM, denying a request for suspension of rental payments on eight oil and gas leases 1/ until

1/ The eight leases held by Appellants are U-72007, U-72008, U-72009, U-72010, U-73059, U-73215, U-73727, and U-74886.

Appellants are able to negotiate a helium sales contract for removal of helium on the land encompassing the oil and gas leases.

Appellants hold eight oil and gas leases covering 8,689.34 acres in Emery County, Utah, in a geological area known as Woodside Dome. The eight leases held by Appellants, each with a primary term of 10 years, had between 7 and 9 years remaining on their terms at the time this appeal was filed. Early in the term of the leases, Appellants realized that the leases "covered lands which were also prospective for commercial quantities of helium which of course is not covered by the Leases issued under the Mineral Leasing Act of 1920, as amended (the `Act')." (Statement of Reasons (SOR) at 2.) Appellants then inquired of the Chief, Helium Field Operations, U.S. Bureau of Mines, as to procedures for securing the right to extract and sell helium from the lands encompassed by their leases. Id. When advised by the Heliem Field Operations Office that the awarding of helium contracts was suspended in a letter dated October 25, 1995, Appellants sought, on November 29, 1995, a suspension of rental payments on the eight leases under the provisions of section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1994), and the regulations at 43 C.F.R. § 3103.4-2.

On January 31, 1996, the Associate District Manager, Moab District, BLM, denied the request for suspension in a decision (ADM Decision) which provided, in pertinent part:

> As you are aware, the Bureau of Land Management (BLM) administers Federal oil and gas leases. Helium was specifically excluded from the Mineral Leasing Act (MLA), so it is not a leased commodity; therefore, it is not included in, nor is it subject to the terms of oil and gas leases administered by BLM. The presence of helium, however, does not impede your ability to produce oil and gas, and thus, comply with the diligence terms of the leases.
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> We understand your argument that the property would demonstrate better economics if all commercial products could be marketed. However, BLM has no jurisdiction over helium, and must administer the oil and gas leases within the bounds of their terms.
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> The only available mechanism for providing relief is suspension of operations and production provided for under Section 39 of MLA. Such suspensions are authorized in circumstances when lease rights have been denied or excessively delayed in the interest of conservation of resources. To date there has been no proposal, so there has been no denial nor delay. Since helium is not covered by these leases, the inability to market helium is not relevant to the terms of the leases.

> An application for permit to drill (APD), or some other request to perform lease operations, is a prerequisite for suspension approval, as there can be no denial or delay of an operation that has not been proposed. In your request, you referred to a decision by the BLM Utah State Director refuting the need for an APD in order to justify a suspension. Actually, the decision provided an exception to the APD requirement in a case where the lessee had submitted a reasonable plan of development, was actively pursuing that plan, and development was being delayed for as long as two years in order to comply with the National Environmental Policy Act (NEPA). We do not believe that decision has application to the issue at hand.
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> In summary, there are two primary conditions that prevent us from approving a suspension: 1) helium is not governed by the leases, and 2) no lease rights have been denied or delayed. Therefore, your request for lease rental relief/suspension is hereby denied.

(ADM Decision at 1-2.)

Appellants subsequently requested State Director Review of the January 31, 1996, Decision. The March 5, 1996, Decision of the Deputy State Director (DSD Decision) determined, in pertinent part:

> As you are aware, the Mineral Leasing Act, and reiterated in the lease terms, specifically excluded helium as a right granted to the lessee. Winona's inability to extract helium from those lands has no bearing on the oil and gas leases. As the right to extract helium was not granted by the lease, no benefits from those leases have been denied. No relief from rental is appropriate under the terms of MLA or the leases. On this basis alone, the conclusion reached by the Moab ADM is supportable.
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> However, to avoid placing an operator between two Federal agencies, the Bureau of Mines was contacted. The Helium Field Office portion of the Bureau of Mines is still in place and [is] still actively processing contracts for the sale of helium. The policy regarding disposition of helium has never changed. Discussions with the Helium Field Office reveal that Winona attempted to obtain a noncompetitive contract for the disposal of helium. When the Helium Field Office informed Winona that Helium contracts could only be awarded through a competitive process, Winona withdrew their proposal. This is confirmed by letters from Winona to the Bureau of Mines, dated January 18, 1995, and June 22, 1995, both specifically requesting the Bureau of Mines not to proceed with any contractual process. Obtaining a helium contract is available should Winona choose to pursue it.

> In summary, the Federal government is not denying Winona any benefits of the oil and gas lease, and the possibility of a helium contract is still available; therefore the ADM's decision of January 31, 1996, denying relief of rental payments is affirmed.

(DSD Decision at 1-2.)

In Appellants' appeal to the Board, they urge that their communications with the Helium Field Operations Office, and specifically the letter from that Office to Mr. Breene of Winona Oil Company on October 25, 1995, established that a helium contract was not available as of October 1995, and "[t]his set of circumstances has effectively foreclosed Appellants from exploring for oil and gas on their Leases, or contracting for exploration by other parties." (SOR at 3-4.) Appellants cite Texaco Inc., 68 I.D. 194 (1961), as supportive of their argument that their inability to acquire a helium contract, because there were no competitive bid opportunities for helium, at least in October 1995, was "exactly the inequity that Congress sought to remedy by the enactment of Section 39." (SOR at 7.)

In Texaco, Inc., supra, two competing lessees, one with oil and gas leases and one with potash leases, had mineral rights on the same lands which were subject to a Secretarial Order providing for the concurrent development of the oil and gas and the potash deposits. Texaco's leases provided that no wells for oil or gas could be drilled if such would result in undue waste of potash deposits or constitute a hazard to or unduly interfere with mining operations being conducted for the extraction of potash deposits. Id. at 196. In that case, the Regional Oil and Gas Supervisor, U.S. Geological Survey denied Texaco an APD because of the lease stipulation and the prospective waste to the potash deposit if drilling occurred, but also denied Texaco a suspension of operating requirements due to the frustration of its enjoyment of the lease. Id. at 195. The Assistant Secretary of the Interior, in reversing the Decision of the Director of the Geological Survey and granting the suspension, found suspension of operations appropriate both because Texaco was precluded from drilling and because the suspension would be in the interest of conservation. The Assistant Secretary stated:

> Inasmuch as the record in this case indicates that the refusal to permit drilling on these leases amounted to an order prohibiting all operations and production thereon and that the order was in the interest of conservation, the appellant's application for suspension under section 39 may be allowed, subject to such reasonable limitations as the Director of the Geological Survey may impose.

Id. at 200. Unlike Texaco, there are no competing lessees in the present case, and there is no frustration of the lease by administrative action of the Department.

[1] Section 39 of the Mineral Leasing Act, as amended, provides for suspension of a Federal oil and gas lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions have the effect of denying the lessee timely access to the property, or (2) as a matter of discretion, in the interest of conservation. Where there is no persuasive evidence of undue delay imposed by administrative actions or denial of the benefits of the oil and gas lease, an application for suspension under section 39 is properly denied. See 43 C.F.R. § 3103.4-2.

We first examine Appellants' claim that suspension of the term of the lease is warranted because it is in the interest of conservation and because their enjoyment of the benefits of the lease will be otherwise frustrated. (SOR at 4-7.) Under section 39 of the Mineral Leasing Act, supra, and 43 C.F.R. § 3103.4-2, the Secretary of the Interior or his delegated representative has the authority to either direct or assent to a suspension of an oil and gas lease "in the interest of conservation." 43 C.F.R. § 3103.4-2(b). Such relief is available only in order to "provide extraordinary relief when lessees are denied beneficial use of their leases." Solicitor's Opinion, Oil and Gas Lease Suspension, 92 I.D. 293, 298-99 (1985).

The burden of showing entitlement to such relief rests with the lessee. Cf. 43 C.F.R. § 3103.4-2(a) ("Complete information showing the necessity of such relief shall be furnished"). The record shows the suspension application did not claim that oil and gas production was precluded on the leases or that any request for an application to drill (APD) had been denied as a result of Appellants' failure to obtain a contract to sell helium. Quite to the contrary, there has been no evidence presented of any frustration of the lease terms within the eight oil and gas leases nor is there evidence that any actions contemplated by Appellants related to the production of oil and gas on the leases was delayed or denied, as required by section 39 for suspension of lease terms.

More importantly, Appellants' claim that they actively sought a competitive lease (the only lease authorized for helium), is not supported by the evidence of record. After seeking information concerning helium contracts, Appellants, on June 22, 1995, through James O. Breene of Winona Oil Company, advised the Helium Field Operations Office that they were not seeking a competitive contract and that "a sealed bid would be counter productive at this time." (June 22, 1995, Letter at 1.)

The Board has construed section 39 of the Mineral Leasing Act to provide for suspension where, through some act or omission by a Federal agency, beneficial enjoyment of a lease has been frustrated. TNT Oil Co., 134 IBLA 201, 203 (1995); see Nedvak Oil & Exploration, 104 IBLA 133, 137 (1988). Such circumstances are not shown to be present here. The Appellants have the opportunity to locate their well sites on their leaseholds and to develop their leases for gas and oil. Choosing not to do so for

reasons extant to the leases—i.e., the possible recovery of helium gas—is not sufficient to demonstrate that they are entitled to a suspension of rental payments. Having decided not to compete for a competitive helium contract and, in fact, having indicated their lack of interest in a competitive contract on June 22, 1995, their present claim that they are precluded from oil and gas recovery as of October 25, 1995, is without merit. Appellants had never indicated to the Helium Field Operations Office that they were interested in a competitive helium contract. Under the circumstances, Appellants have failed to meet the "extraordinary" requirement set forth in section 39, or to establish any factual predicate to a claim that they have been denied the beneficial use of their leases.

We therefore find that BLM properly denied Appellants' request for a suspension of the rental payments on the subject leases. We find that BLM properly determined that without evidence of frustration of the right to extract and market oil and gas, a suspension under section 39 of the Mineral Leasing Act was not warranted, and, having found no legal grounds to warrant lease suspension, BLM properly denied Appellants' request.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge